

AMAR: Second thoughts on Kavanaugh

[Akhil Amar](#)

Minutes after President Trump nominated Judge Brett Kavanaugh '87 LAW '90 to the Supreme Court, I published a [controversial op-ed in The New York Times](#) endorsing the nomination. I later [testified in support of Kavanaugh](#) on the final day of his confirmation hearings. I still stand by what I have said about Kavanaugh's uniquely impressive judicial and scholarly record over the last dozen years. But now that serious accusations have arisen about his conduct in his teenage years, I believe that these accusations deserve the best and most professional investigation possible — even if that means a brief additional delay on the ultimate vote on Judge Kavanaugh, and even if that investigatory delay imperils his confirmation.

As agonizing as this delay might be for all concerned, in the long run this additional investigation is the best way forward, not just for the Court and the country and Kavanaugh's accusers, but also for Kavanaugh himself. If the investigation's facts and findings support him, then he will join the Court in the sunshine and not under a cloud. If instead the investigation uncovers compelling evidence against him, President Trump should be ready with a pre-announced back-up nominee.

Because Kavanaugh has been accused of serious misconduct, he deserves to be heard as speedily as possible, and in a public forum. Of course, the strict letter of the Constitution's Sixth Amendment does not apply because no criminal charges are pending against Kavanaugh. But the spirit of the Sixth Amendment and its underlying vision of fair play are nonetheless instructive: "The accused shall enjoy the right to a speedy and public trial" — an opportunity to tell the world as early and as emphatically as possible that he is innocent, and to directly counter the claims of his accusers. Thursday's

scheduled Senate hearing will, in effect, be the proper opening round of this speedy and public trial, giving Kavanaugh's accusers a chance to present their evidence and then giving Kavanaugh himself a speedy and public opportunity to tell his side of the story.

But if, after this opening round, large and potentially resolvable factual questions remain (for example: who else was at the Yale party and what did they see?), there should be additional fact-finding by Senate investigators and/or the FBI, followed if necessary by one final Senate hearing. In exchange for Senate Republicans' willingness to reopen Pandora's box, Senate Democrats should promise to agree to a firm end-date (say, October 5), come what may. This proposal, while somewhat similar to [one endorsed by many of my Yale Law School faculty colleagues last week](#), differs in that (1) I favor an investigation after, not before, an initial (speedy, public) Senate hearing on this accusation, and (2) my proposal seeks to directly address Republican anxiety about an indefinitely prolonged investigation process.

Republicans might nonetheless worry that Democrats will try to find new accusers and episodes, and will then seek still more extensions to conduct ever wider investigations in an endless game of Whack-a-Mole.

Here is where President Trump's back-up nominee would come into play. Nothing in the Constitution prevents President Trump from formally naming — this very week — his back-up candidate. (For more on this largely unnoticed point, see [the May 7, 2009 op-ed](#) that Yale Law Professor Ian Ayres '81 LAW '86 and I co-wrote for the Los Angeles Times.) President Obama's thwarted pick for the Court, sixty-five year old Merrick Garland, will definitely not be Trump's backup; but forty-six year old Judge Amy Coney Barrett could well be — a pro-life woman with an admirable life story and a short paper trail, with ideas likely to be closer to those of Antonin Scalia (for whom she clerked) than Anthony Kennedy (for whom Kavanaugh clerked). Another impressive candidate is Judge Joan Larsen, also a former Scalia

clerk and a distinguished legal thinker. Other possible backups from President Trump's announced summer short list include federal judges Thomas Hardiman, Raymond Kethledge, and Amul Thapar and Senator Mike Lee.

Background checks on the back-up nominee could begin immediately—even while Kavanaugh's name remains under active consideration — and Senate Majority Leader Mitch McConnell is free to take the position that, even if Democrats win back the Senate in November, he will schedule the back-up nominee for a final confirmation vote during the December lame-duck session of Congress, with Republicans still in control. Such a move by McConnell would be extreme political hardball — shades of the 1801 midnight judges controversy underlying the famous 1803 case of *Marbury v. Madison*! — but technically permissible under the Constitution's written rules.

Even at the conclusion of the Kavanaugh investigation, some uncertainty may still remain about what really happened long ago in alcohol-soaked encounters. On this key question, Senators and Americans everywhere must judge for themselves; as a constitutional scholar, my guess is no better than anyone else's.

But in my capacity as a scholar, I do seek to stress two key points about our Constitution's letter and spirit. First, a back-up nominee could constitutionally be proposed by the president at any time and voted on by the Senate in the lame-duck session if Kavanaugh's nomination fails. Second, the integrity of the Supreme Court itself and of our constitutional system as a whole would be better served — and so would Judge Kavanaugh himself, in the long run — if Senators authorize a full investigation before they cast their final vote on Judge Kavanaugh.

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